Supreme Court, U.S.
FILED

FEB 24 2003

OFFICE OF THE CLERK

(16) (9)

Nos. 02-722, 02-733

IN THE

Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, *et al.*,
Petitioners,

v.

JOHN GARAMENDI, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,
Respondent.

GERLING GLOBAL REINSURANCE CORP., *et al.*,
Petitioners,

v.

JOHN GARAMENDI, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF GOVERNMENT OF SWITZERLAND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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25 pp

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Pursuant to Rule 37 of the Rules of this Court, the Government of Switzerland respectfully submits this brief as

amicus curiae to urge reversal of the judgment below.[1] Petitioners and respondent consented to the filing of this brief.

INTEREST OF THE AMICUS CURIAE

Arising simultaneously with major reevaluations by many countries of the conduct of their governments, industries, and general populations during the World War II era, the issue of payments by corporations to resolve outstanding World War II era claims has become prominent in recent years. The role of civil lawsuits in the United States courts in this process has itself been highly controversial.

Switzerland was the first country to deal in a comprehensive manner with the issue of corporate payments to resolve World War II era claims. On August 9, 2000, the U.S. District Court for the Eastern District of New York formally approved a settlement agreement among Swiss companies, class action plaintiffs, and the World Jewish Restitution Organization. The settlement agreement, which includes payment to the plaintiffs of $1.25 billion, by its terms provides for complete legal and material resolution of Holocaust-related issues for all of Switzerland, with the exception of three Swiss insurance companies. Meanwhile, the Government of Switzerland has endorsed the work of the International Commission on Holocaust Era Insurance Claims, an international organization formed to address unpaid insurance claims.

The Government of Switzerland has grave concerns that the decision of the U.S. Court of Appeals for the Ninth Circuit, by encouraging the State of California and other States to pursue their own unilateral agendas, may undermine the extensive efforts that have been made by Swiss industry,

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[1] Counsel for the Government of Switzerland prepared this brief in its entirety, and no person or entity other than the Government of Switzerland and its counsel made a monetary contribution to its preparation or submission.

major Jewish organizations, and the Swiss and United States governments to achieve a comprehensive resolution of a difficult and complex international issue. In addition, the Government of Switzerland has a vital interest in the preservation of the integrity of the laws and legal system of Switzerland, and believes that the decision of the Ninth Circuit must be reversed to prevent the California statute from requiring the production of confidential information from Switzerland in a manner inconsistent with Swiss law and sovereignty.

Accordingly, the Government of Switzerland submits this brief to explain its views on why the California statute, if applied, would interfere with Swiss-United States relations.

SUMMARY OF ARGUMENT

The Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"), Cal. Ins. Code §§13900-13807, is a California statute that would impose onerous reporting burdens on foreign companies, including Swiss companies, relating to records of World War II era transactions that took place over fifty years ago in foreign countries with persons who were not United States citizens or present in the United States at the time of those transactions. The purpose of the statute is to facilitate the initiation of civil lawsuits in California against foreign companies.

On February 7, 2001, the U.S. Court of Appeals for the Ninth Circuit reversed the holdings of the U.S. District Court for the Eastern District of California and held that the HVIRA is consistent with the Foreign Commerce Clause and does not infringe upon the foreign affairs power of the Executive Branch. On remand, the district court issued a permanent injunction enjoining enforcement of the HRIVA on the grounds that mandating license suspension for non-performance of impossible tasks deprived the petitioners of a protected property interest without due process of law. On July 15, 2002, the Ninth Circuit again reversed the district court, distinguished the decision of the U.S. Court of Appeals

for the Eleventh Circuit with respect to a similar statute in *Gerling Global Reins. Corp. v. Gallagher*, and upheld the HRIVA against the petitioners' constitutional claims.

Contrary to the Ninth Circuit's holdings, the HVIRA, if applied, will have a significant effect on the foreign relations of the United States with Switzerland. The HVIRA is inconsistent with the August 9, 2000 settlement of class action claims against Swiss interests in the United States District Court for the Eastern District of New York, as well as with a joint Swiss-United States undertaking on Holocaust-related claims. In addition, by requiring Swiss companies to provide confidential information from Switzerland, the HVIRA would compel the violation of Swiss sovereignty and Swiss privacy laws. Finally, the Ninth Circuit's decision conflicts with rulings of this Court and the U.S. Courts of Appeals for the First and Eleventh Circuits.

Based on these factors, this Court should reverse the Ninth Circuit's decision and hold that the HRIVA is unconstitutional.

ARGUMENT

A. The HVIRA Is Inconsistent With a Pre-Existing Settlement Agreement Between Swiss Industry, Class Action Plaintiffs, and the World Jewish Restitution Organization That Is Supported by the Swiss and United States Governments

On August 9, 2000, the U.S. District Court for the Eastern District of New York formally approved a settlement agreement among Swiss companies, class action plaintiffs, and the World Jewish Restitution Organization regarding World War II era claims in the case *In re: Holocaust Victims Assets Litigation*, 96 Civ. 4849, 2000 U.S. Dist. Lexis 15644 (E.D.N.Y. Aug. 9, 2000). The settlement agreement, which includes payment to the class action plaintiffs of $1.25 billion, by its terms provides for complete legal and material

resolution of Holocaust-related issues for all of Switzerland, with the express exception of three Swiss insurers.[2]

The Swiss and United States Governments have formed a Joint Economic Commission ("JEC"), comprised of senior representatives of the two governments. In a Joint Statement issued through the JEC on January 29, 2000, the Swiss and United States Governments reaffirmed their determination to maintain open markets and to promote bilateral market access for trade, finance and investment, including the insurance industry. With regard to Holocaust-related matters, the JEC commended Switzerland's ongoing efforts and specifically:

> welcom[ed] the settlement that was achieved in In Re Holocaust Victim Assets Litigation . . . which . . . when approved will be recognized by all interested parties as complete legal and material resolution of Holocaust related issues for all of the Swiss economy . . . and for the Swiss government.

ER 2384-85.[3]

The application of the HVIRA to Swiss companies (other than the three specifically exempted from the settlement) would interfere with the settlement agreement's release of the Swiss economy and would be inconsistent with the policies of the Swiss and United States Governments supporting that settlement.

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[2] The three exempted insurers are Basler Lebensversicherungs-Gesellschaft, Zurich Lebensversicherungs-Gesellschaft, and Winterthur Lebensversicherungs-Gesellschaft.

[3] Citations to "ER" refer to the Excerpts of Record in the preliminary injunction appeal to the Ninth Circuit.

B. The HVIRA Conflicts With a Joint Endorsement of the International Commission on Holocaust Era Insurance Claims by the Swiss and United States Governments

The JEC's January 29, 2000 Joint Statement specifically addressed the issue of insurance claims by stating that the two governments:

> further welcom[ed] the ongoing constructive discussions in the framework of the International Commission on Holocaust Era Insurance Claims ... on unpaid policies of European insurance companies dating from [the World War II] period, as an appropriate forum for resolving Holocaust related issues for those three Swiss insurance companies not [released] by the Swiss settlement.

ER 2385.

In the Action Plan annexed to the Joint Statement, the United States Government pledged to "call on State insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers." ER 2390.

The JEC Joint Statement and the associated United States Government assurances are of great importance to Switzerland and Swiss industry, and accordingly the Government of Switzerland has expressed concern to the United States Government and the United States courts about the HVIRA on a number of occasions. For example, on April 6, 2000, the Government of Switzerland presented to the United States Government an Aide-Mémoire expressing its opinion that state laws such as the HVIRA would violate Swiss sovereignty and international law. App., *infra*, A-1. On June 2, 2000, the Government of Switzerland sent its views on the HVIRA directly to the district court. ER 2375. On August 9, 2000, the Government of Switzerland presented

a diplomatic note to the United States Government regarding this case, in which it requested that the United States Government submit a brief as *amicus curiae* to the Ninth Circuit re-affirming the view that State legislative bodies should refrain from threatening or imposing sanctions against Swiss insurers. App., *infra*, B-1. The Government of Switzerland later submitted a brief as *amicus curiae* to the Ninth Circuit in support of the Petitioners' request for a rehearing *en banc* before the case was remanded to the district court, and submitted a brief as *amicus curiae* supporting the granting of the petition for certiorari in this appeal.

The Government of Switzerland is particularly concerned that actions taken by the State of California under the HVIRA will jeopardize the work of the International Commission on Holocaust Era Insurance Claims, which was formed to address issues of unpaid World War II era insurance claims. In the view of the Government of Switzerland, that commission is the most effective and expeditious vehicle for resolving unreceived and as yet unsettled insurance claims from the World War II era that are not already covered by the settlement agreement discussed above.

Finally, the Government of Switzerland notes that the JEC is a continuing initiative, and that since the January 29, 2000 Joint Statement the JEC has engaged in a number of discussions and joint projects on other topics. For example, the JEC has promoted bilateral cooperative efforts on industry biosafety measures to safeguard laboratories and pathogens from terrorist access, and has spearheaded efforts to combat international economic crime, including the blocking of terrorist financing and the freezing of terrorist assets. The JEC also provides a forum for the discussion of bilateral trade issues. *See* Agenda for January 25, 2003 JEC Plenary Session, App., *infra*, C-1. To the extent that the United States Government is unable to implement the joint recommendations of the JEC – such as with respect to the issues involved with the HVIRA – the Government of

Switzerland is concerned that the credibility and effectiveness of the JEC may be undermined.

C. The HVIRA Would Require Swiss Companies to Violate Swiss Law

California lacks jurisdiction, as that concept is commonly understood in international law, to regulate foreign companies with respect to transactions that took place in foreign countries with persons who were not United States citizens or present in the United States at the time of those transactions.[4] In the absence of a genuine connection between the issues involved and United States jurisdiction, the enforcement of the HVIRA against insurance companies headquartered in Switzerland would violate international law and Swiss sovereignty. Furthermore, such enforcement would result in conflicting requirements imposed on the companies concerned to the extent that compliance with the California legislation would require a violation of the applicable Swiss privacy laws, resulting in interference with the Swiss legal system.[5]

In the view of the Government of Switzerland, the HVIRA bears no genuine relation to the regulation of the provision of insurance services in California, but rather is designed to demonstrate that the state of California disapproves of the international cooperative actions taken to facilitate resolution of Holocaust era claims. Especially under

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[4] *See, e.g.*, Restatement (Third) of the Foreign Relations Law of the United States (1987) § 403 ("[A] state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.").

[5] For example, Article 273 of the Swiss Penal Code prohibits persons in Switzerland from releasing to foreign governments confidential business information relating to third parties, unless certain procedures are followed within Switzerland that ensure that the rights of third parties are appropriately protected. The California statute does not allow for the application of this Swiss law.

these circumstances, the HVIRA's extraterritorial reach cannot be justified.

D. The Ninth Circuit's Decision Conflicts with Holdings of this Court and the U.S. Courts of Appeals for the First and Eleventh Circuits

The Ninth Circuit's decision is inconsistent with holdings of this Court and other Courts of Appeals on the Commerce Clause, the foreign affairs powers of the Executive Branch and the requirements of due process.

In its initial ruling, the Ninth Circuit made the following comment on the January 29, 2000 Joint Statement of the JEC:

> But even if we were to assume that a conflict exists between the Holocaust Act and the Swiss-US Joint Statement with regard to seeking information from Swiss insurers, Congress' action controls in this instance.... [A]s noted, the Swiss-US Joint Statement is not a treaty, and preemption is not an issue here. Plaintiffs' argument that a "policy interest" found in an executive branch "Joint Statement" creating an Economic Commission trumps Congress' express constitutional authority to regulate foreign commerce is incorrect.

Petition for Certiorari App. 54a-55a (footnotes omitted).

There is no dispute that Congress has the authority to regulate foreign commerce, but Congress has not enacted any statute that preempts or otherwise restricts the ability of the Executive Branch to engage in negotiations with Switzerland or other foreign countries regarding resolution of Holocaust-related claims. The interpretation by the Ninth Circuit appears to suggest that, absent the implementation of a formal treaty, the Executive Branch lacks any foreign affairs power worthy of respect by the courts. Such a restrictive interpretation of the foreign affairs authority of the Executive Branch, if allowed to stand, would have significant

consequences for the ability of the federal government to interact with foreign nations.

Although the Ninth Circuit recognized that the Supreme Court's decision in *Zschernig v. Miller*, 389 U.S. 429 (1968), held that a state may not intrude on the federal government's foreign affairs power, it declined to apply that decision. The Ninth Circuit's ruling also is inconsistent with the recent holding of the U.S. Court of Appeals for the First Circuit on the foreign affairs power in *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 49-59 (1st Cir. 1999), *aff'd on other grounds sub nom., Crosby v. National Foreign Trade Council*, 120 S. Ct. 2228 (2000).

Finally, the Ninth Circuit's ruling conflicts with the Eleventh Circuit's decision in *Gerling Global Reins. Corp. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001), which invalidated Florida's Holocaust Victims Insurance Act. Like the HRIVA, the Florida statute imposed reporting requirements on the Florida affiliates of European insurers that issued policies during the Holocaust to facilitate civil lawsuits for World War II era claims. The Eleventh Circuit held that the Florida statute violated due process limits on Florida's legislative jurisdiction. Notwithstanding the Ninth Circuit's attempt to distinguish *Gallagher*, the facts and issues presented in these two cases were virtually identical. The Government of Switzerland believes that the reasoning of the Eleventh Circuit in *Gallagher* is persuasive and is equally applicable to the HVIRA.

CONCLUSION

For the foregoing reasons, the Court should reverse the Ninth Circuit's decision and hold that the HRIVA is unconstitutional.

Respectfully submitted,

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February 24, 2003